RECENT DEVELOPMENTS

*Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc.**

I. INTRODUCTION

Arbitration can be described as a process that leads to the efficient resolution of disputes without resort to the time and expense of litigation. Nevertheless, there are occasions when a party to a given dispute may feel that the dispute requires litigation. When such a party is determined to avoid arbitration, a federal district court may be required to ascertain whether an arbitration clause contained in an agreement between or among the involved parties requires that the dispute be submitted to arbitration.[1] The party favoring arbitration may seek appellate review of an adverse arbitrability determination; this party may also move to stay the litigation in the district court pending the appeal.[2]

For many years, the appealability of an arbitrability determination was controlled by a convoluted web of federal appellate jurisprudence known as the *Enelow-Ettelson* doctrine.[3] Loosely based on the old distinctions between law and equity, the doctrine was ultimately rejected by the Supreme Court in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*[4] In 1988, shortly after the *Gulfstream* decision, Congress amended the Federal Arbitration Act (FAA) to provide a statutory basis for determining the

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* 128 F.3d 504 (7th Cir. 1997).

[1] The Federal Arbitration Act (FAA) provides for motions to stay litigation pending arbitration, *see* 9 U.S.C. § 3 (1994), as well as motions to compel parties to submit to arbitration, *see* 9 U.S.C. § 4 (1994).

[2] The scenario may be played out in reverse, in which a party resisting arbitration may ask that an arbitration be stayed pending appeal of a determination in favor of arbitration. *See infra* notes 6–7 and accompanying text; *see also infra* Part III.B.

[3] *See generally* 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3923, at 132–137 (2d ed. 1996); Olsen v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731 (7th Cir. 1986); Pamela Mathy, *The Appealability of District Court Orders Staying Court Proceedings Pending Arbitration*, 63 MARQ. L. REV. 31 (1979). The doctrine draws its name from the first two cases to invoke it, *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935), and *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942).

[4] 485 U.S. 271 (1988).

appealability of arbitrability determinations made in federal courts.[5] As a result, § 16 of the FAA[6] generally denies an immediate appeal from arbitrability determinations favoring arbitration and allows an immediate appeal from determinations adverse to arbitration.[7] Notably, the statute

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[5] *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1019(a), 102 Stat. 4642, 4670-4671 (1988) (codified as amended at 9 U.S.C. § 16 (1994)). Originally numbered § 15, the section was renumbered § 16 by the Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 325(a)(1), 104 Stat. 5089, 5120. *See* 9 U.S.C.A § 16, David D. Siegel, Practice Commentary, Appeals for Arbitrability Determinations, at 376 (West Supp. 1998).

[6] The statute provides:

> (a) An appeal may be taken from—
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> (1) an order—
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> (A) refusing a stay of any action under section 3 of this title,
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> (B) denying a petition under section 4 of this title to order arbitration to proceed,
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> (C) denying an application under section 206 of this title to compel arbitration,
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> (D) confirming or denying confirmation of an award or partial award, or
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> (E) modifying, correcting, or vacating an award;
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> (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
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> (3) a final decision with respect to an arbitration that is subject to this title.
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> (b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—
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> (1) granting a stay of any action under section 3 of this title;
>
> (2) directing arbitration to proceed under section 4 of this title;
>
> (3) compelling arbitration under section 206 of this title; or
>
> (4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C. § 16 (1994).

[7] *See id.* It should be noted that, while it may have been Congress's intention to provide a clearly pro-arbitration framework for determining appealability of arbitration determinations, the drafters of § 16 left a loophole. Section 16(a)(3) provides for the immediate appeal of a "final decision with respect to an arbitration." *Id.* § 16(a)(3). If the only issue before the district court is the arbitrability of a particular dispute, then a decision either way can be construed as a "final decision." Consequently, even a decision in favor of arbitration can be immediately appealed, thus frustrating the obvious intent of Congress to streamline the progress of cases into arbitration. For a more thorough discussion of this problem, and a suggested solution, see Siegel, *supra* note 5, at 377-379. The issue of the *appealability* of arbitrability determinations is distinct from the issue of stays pending appeal of those determinations, and this Note is only concerned with the latter. For more thorough examinations of the appealability

does not address the issue of whether a stay of proceedings in the district court may be obtained pending an appeal of a determination against arbitration.[8]

In *Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc.*,[9] the Seventh Circuit addressed this specific issue, granting a stay of proceedings to a party appealing a district court's determination that a contractual dispute was not subject to arbitration.[10]

Circuit opinions on this subject are quite rare, and Judge Frank Easterbrook's *Bradford-Scott* opinion is remarkable in its approach to the issue. An overview of the facts and procedural history of the case follows in Part II of this Note. Part III briefly outlines the usual path to obtaining a stay pending appeal and discusses the Seventh Circuit's prior hostility to requests for stays of arbitration pending the appeal of determinations *favorable* to arbitration. Part IV discusses Judge Easterbrook's disposition of the stay issue in *Bradford-Scott* and examines the conflict that his approach creates between the Seventh and Ninth Circuits concerning the ability of a district court to proceed with a case after the appeal of a determination *adverse* to arbitration. Part V concludes that the Seventh Circuit's framework for assessing stays pending appeal of arbitrability determinations—completed by Judge Easterbrook's opinion in *Bradford-Scott*—is ultimately consistent with the pro-arbitration philosophy currently in vogue in the federal courts.

II. *BRADFORD-SCOTT*: FACTS AND PROCEDURAL HISTORY

Bradford-Scott Data Corporation (Bradford-Scott) entered into an agreement with VERSYSS Inc. (VERSYSS) to redistribute software produced by VERSYSS.[11] In 1988, the parties executed a Vertical Value

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issue, see 15B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3914.17 (2d. ed. 1992); Edith Jones, *Appeals of Arbitration Orders—Coming Out Of the Serbonian Bog*, 31 S. TEX. L. REV. 361 (1990); William G. Phelps, *Appealability of Order Staying, or Refusing to Stay, Proceeding in Federal District Court Pending Arbitration Procedure*, 110 A.L.R. Fed. 148 (1992).

[8] *See* C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp., 716 F. Supp. 307, 309 (W.D. Tenn. 1989).

[9] 128 F.3d 504 (7th Cir. 1997).

[10] *See id.* at 507.

[11] *See id.* at 504.

Added Reseller Agreement (VAR)[12] and in 1993 executed a Master License Agreement (MLA).[13] According to the complaint filed by Bradford-Scott, Physician's Computer Network, Inc. (PCN) subsequently acquired VERSYSS.[14] PCN sold a software package in competition with the package licensed from VERSYSS by Bradford-Scott; eventually, Bradford-Scott brought suit against VERSYSS and PCN alleging breach of contract and seeking damages and injunctive relief.[15]

PCN and VERSYSS filed a motion pursuant to § 3 of the FAA[16] seeking to stay the proceedings in the district court pending arbitration of the breach of contract claims. The court held that, since the claims that Bradford-Scott asserted arose out of the 1993 MLA, and not the 1988 VAR, the narrow arbitration clause in the 1993 MLA would determine the arbitrability of those claims. The court concluded that the 1993 clause did not cover the claims; therefore, the claims were not arbitrable, and the court refused to stay discovery and trial pursuant to § 3.[17]

PCN and VERSYSS immediately appealed the arbitrability determination to the Seventh Circuit, and requested that the district court issue a stay of its proceedings pending appeal of the arbitrability issue. The district court refused to issue a stay pending appeal because, in its opinion, the order refusing to issue a stay pursuant to § 3 was not an appealable order.[18] PCN and VERSYSS subsequently requested a stay pending appeal

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[12] *See id.*; *see also* Bradford-Scott Data Corp. v. Physician Computer Network, Inc., 136 F.3d 1156, 1157 (7th Cir. 1998) [hereinafter *Bradford-Scott II*]. The 1988 agreement was actually between Bradford-Scott and Contel Business Systems, a predecessor entity of VERSYSS. *See id.* at 1157–1158.

[13] *See id.* at 1157.

[14] *See id.*

[15] *See Bradford-Scott*, 128 F.3d at 505.

[16] Section 3 provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing that the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (1994).

[17] *See Bradford-Scott*, 128 F.3d at 505.

[18] *See id.*

from the Seventh Circuit; this request was granted,[19] and its resolution is discussed below.[20] Ultimately, a different panel of the Seventh Circuit upheld the district court's determination that the dispute was not subject to arbitration.[21]

III. STAYS PENDING APPEAL AND THE SEVENTH CIRCUIT

A. *Stays Pending Appeal: The Four-Prong Test*

Merely filing an appeal does not operate to stay the enforcement of a lower court's judgment. To obtain such relief, a party must secure a stay pending appeal of the lower court's ruling.[22] This request is normally made in the first instance to the district court that issued the ruling.[23] If the request for stay is denied, the party may then ask the appellate court for the same relief.[24] When evaluating a request for a stay pending appeal, both district and appellate courts have looked to a four-prong test given the imprimatur of the Supreme Court in *Hilton v. Braunskill*.[25]

The components of the test are as follows: (1) Has the stay applicant shown a likelihood of success on the merits of the appeal; (2) Will the stay applicant be irreparably harmed by a refusal to grant the stay; (3) Will the issuance of the stay substantially injure the other interested parties to the proceeding; and (4) Does the public interest favor the issuance of a stay?[26]

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[19] *See id.* PCN and VERSYSS appealed the § 3 determination pursuant to 9 U.S.C. § 16(a)(1)(A). Judge Easterbrook's opinion granting the stay pending appeal described as "untenable" the district court's determination that the order it had entered was unappealable. *See Bradford-Scott*, 128 F.3d at 505.

[20] See *infra* Part IV.

[21] *See Bradford-Scott II*, 136 F.3d at 1158. On the issue of arbitrability, the Seventh Circuit affirmed the district court's holding and added that the 1993 MLA contained a clause stating that any conflicts between the 1988 and 1993 agreements would be controlled by the 1993 MLA. *See id.* The court noted that VERSYSS had, in fact, rejected a broader arbitration clause and had itself proposed the narrow clause ultimately incorporated into the 1993 agreement. *See id.*

[22] *See* 16A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, § 3954, at 282 (2d ed. 1996).

[23] *See generally* FED. R. APP. PROC. 8(a).

[24] *See id.*; *see also* 16A WRIGHT ET AL., *supra* note 22, § 3954, at 282.

[25] 481 U.S. 770 (1986). *See* 16A WRIGHT ET AL., *supra* note 22, § 3954, at 284 n.7.

[26] *See Hilton*, 481 U.S. at 776.

Different circuits have applied this test in a variety of ways. Some stress the likelihood of success on the merits as the predominant prong, while others allow a strong showing on one prong to compensate for a weak showing on other prongs.[27] This test is widely applied, and is not confined to questions of stay pending appeal of arbitrability determinations.[28] In recent years, however, the Seventh Circuit has adopted an almost irrebuttable presumption that the irreparable harm prong cannot be met by parties seeking to stay an *arbitration* pending appeal of a determination favoring arbitration.[29] In contrast to this presumption, the *Bradford-Scott* opinion adopts an almost automatic grant of a stay of *litigation* pending appeal of a determination adverse to arbitration.[30]

B. *The Seventh Circuit and Stays of Arbitration*

In *Graphic Communications Union v. Chicago Tribune Co.*,[31] the Seventh Circuit established a nearly irrebuttable presumption that parties requesting a stay of arbitration will be unable to satisfy the irreparable harm prong. The defendant publishing company requested a stay of arbitration pending its appeal of an order to arbitrate a labor dispute with the union.[32] The court alluded to the operation of the *Hilton* test, holding that a likelihood of success on the merits was a "necessary but not sufficient" condition for granting a stay pending appeal.[33] Judge Richard Posner noted that the irreparable harm prong must also be satisfied, and in the context of a request to stay an arbitration, Judge Posner found it "very difficult to imagine" a case in which this prong could be satisfied.[34] The costs of arbitration could never be considered "irreparable"; consequently, a

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[27] *See generally* John Y. Gotanda, *The Emerging Standards for Issuing Appellate Stays*, 45 BAYLOR L. REV. 809 (1993).

[28] *See* 16A WRIGHT ET AL., *supra* note 22, § 3954.

[29] *See* Independent Lift Truck Builders Union v. Hyster Co., 803 F. Supp. 1374, 1375 (C.D. Ill. 1992) (applying this presumption to a request for a stay of arbitration).

[30] *See Bradford-Scott*, 128 F.3d at 506.

[31] 779 F.2d 13 (7th Cir. 1985).

[32] *See id.* at 15.

[33] *See id.*

[34] *Id.* Indeed, Judge Posner began the opinion by stating that "[n]ot only has the request for a stay [of arbitration] no merit but the whole class of requests that it illustrates has no merit, a point we wish to emphasize in order to discourage the making of such requests in the future." *Id.* at 14.

request to stay arbitration would inevitably fail the test for obtaining a stay.[35] Admitting the possibility of the "extraordinarily rare" case that might warrant a stay of arbitration, the court nevertheless warned future applicants that it would not hesitate to level sanctions against parties making reflexive requests for stays in run-of-the-mill cases.[36]

The Seventh Circuit's threat to assess sanctions was not an empty one; in cases decided six weeks apart, the Circuit twice charged the cost of responding to a request for a stay of arbitration to parties resisting arbitration.[37] In *PaineWebber, Inc. v. Farnham*,[38] Judge Easterbrook emphasized the almost unattainable nature of a stay of arbitration by noting that, in the *Graphic Communications* case, the issue of arbitrability was eventually decided in favor of the party seeking the stay of arbitration.[39] Nevertheless, Judge Easterbrook remarked, this only makes clear the point that, even when success on the merits is likely, the inability to show irreparable harm will almost always doom a request for a stay of arbitration.[40] Judge Easterbrook assessed sanctions, noting that "[l]itigants must think twice before filing papers that put their adversaries to expense; they must think three times before filing in arbitration cases; there is no evidence that PaineWebber thought even once before seeking a stay pending appeal."[41]

The Seventh Circuit's position in the case of a request to stay *arbitration* is predicated on a failure to show irreparable harm. The position assumed in *Bradford-Scott* in regard to a request to stay *litigation* is predicated on a much different disability—a lack of jurisdiction to proceed in the district court.

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[35] *See id.*

[36] *See id.* at 16.

[37] *See* PaineWebber Inc. v. Farnam, 843 F.2d 1050, 1053 (7th Cir. 1988); Classic Components Supply, Inc. v. Mitsubishi Elec. Am., Inc., 841 F.2d 163, 166 (7th Cir. 1988).

[38] 843 F.2d 1050 (7th Cir. 1988).

[39] *See PaineWebber*, 843 F.2d at 1052 (citing Graphic Communications Union v. Chicago Tribune Co., 794 F.2d 1222 (7th Cir. 1986)).

[40] *See PaineWebber*, 843 F.2d at 1052.

[41] *Id.* at 1053.

IV. *BRADFORD-SCOTT* AND CREATION OF THE AUTOMATIC STAY

A. *Dismissal Of The Four-Prong Test*

The *Bradford-Scott* defendants applied to the Seventh Circuit for a stay pending appeal after the district court rejected their request for that relief.[42] Judge Easterbrook quickly dismissed as "untenable" the lower court's reasoning for denying a stay pending appeal of the arbitrability determination.[43] The lower court determined that the order it had entered denying arbitrability was unappealable and therefore a stay of the trial pending appeal should not issue; Judge Easterbrook noted that § 16(a)(1)(A) of the FAA provides for appeals of this type.[44] The postures assumed by the parties arguing the stay request were similarly rejected:

> For their part, the parties have approached the issue as if appellants were seeking a stay of an injunction, rather than a delay in proceedings. To obtain a stay of a district court's judgment, the appellant must establish irreparable harm and a significant probability of success on the merits, against a background norm that appellate courts are reluctant to disturb decisions in advance of full review.[45]

This reference to the parties' apparent briefing of the four-prong test (which is, in fact, also used to evaluate requests for stays of injunctions)[46] was followed by a quick dismissal of appellant's chances of success on that standard. Judge Easterbrook opined that the costs of litigation cannot constitute irreparable harm; therefore, appellants' request for a stay would "fail at the outset."[47] This appears to be entirely consistent with the Seventh Circuit's irrebuttable presumption standard; however, Judge Easterbrook then considered the issue from an entirely different perspective, asking "not whether appellants have shown a powerful reason why the district court must halt proceedings, but whether there is any good reason why the district court may carry on once an appeal has been

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[42] *See Bradford-Scott*, 128 F.3d at 505.

[43] *See id.*

[44] *See id.*

[45] *Id.*

[46] *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2904, at 501–503 (2d ed. 1995).

[47] *Bradford-Scott*, 128 F.3d at 505.

filed."[48] Adopting this perspective, the Seventh Circuit established an almost automatic stay upon the filing of an appeal of an arbitrability determination adverse to arbitration.[49]

B. *Divestiture of Jurisdiction as the Basis for an Automatic Stay*

Judge Easterbrook's basic position is that the district court is divested of jurisdiction to proceed when an appeal is filed under § 16(a) of the FAA.[50] Once that premise is established, the evaluation of a request for stay pending appeal becomes more simple, as the district court can hardly continue proceedings without jurisdiction over the case. Judge Easterbrook relied on an axiomatic proposition to support his position: the filing of an appeal divests the district court of jurisdiction over those aspects of the case involved in the appeal.[51] It is Judge Easterbrook's contention that what is "involved" in an arbitrability appeal—at least when the district court's determination is adverse to arbitration—is the very question of whether the district court can proceed with the case. Judge Easterbrook stated that continuing the proceedings in the lower court "largely defeats the point of the appeal."[52]

Judge Easterbrook also noted the loss of the movant's "benefit of the bargain" if the movant is forced to go through a trial only to prevail on the arbitrability issue at the appellate level and then have to go through arbitration.[53] Judge Easterbrook perceived a situation where a party would be put to the cost of both arbitration and litigation;[54] to ground his decision

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[48] *Id.*

[49] *See id.* at 506.

[50] *See id.* at 505. "Divestiture of jurisdiction" is perhaps a misnomer. The district court is surely not entirely without involvement in the case while an appeal is pending. *See, e.g.*, Goshtasby v. Board of Trustees of the Univ. of Ill., 123 F.3d 427, 428 (7th Cir. 1997) (noting that an appeal may endow both the district and appellate courts with "authority over discrete portions of the case"). In this context, divestiture of jurisdiction simply means that the district court is divested of its ability to move forward with the process of preparing for and conducting a trial on the merits. *See Bradford-Scott*, 128 F.3d at 507; *see also* Apostol v. Gallion, 870 F.2d 1335, 1337–1338 (7th Cir. 1989).

[51] *See Bradford-Scott*, 128 F.3d at 505 (quoting Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982)).

[52] *See id.*

[53] *See id.* at 506.

[54] *See id.*

in that observation would be to concede, at least implicitly, that the costs of litigation—both financial and strategic—would in essence constitute irreparable harm.[55] Therefore, Judge Easterbrook's actual holding is grounded solely on the divestiture of jurisdiction argument.[56]

Bradford-Scott completed the Seventh Circuit's creation of an almost per se framework for evaluating stays pending appeal from determinations of arbitrability. With language remarkably similar to that used by Judge Posner in *Graphic Communications*,[57] Judge Easterbrook stated that "similar requests" to the Circuit for stays in the future should be "unnecessary."[58] The implication is that, when a request is made for a stay of trial pending appeal of a determination adverse to arbitration, the relief should automatically be granted by the district court in the first instance. However, Judge Easterbrook's reliance on a divestiture of jurisdiction argument to support his creation of the automatic stay places the Seventh Circuit in conflict with a prior decision of the Ninth Circuit, *Britton v. Co-op Banking Group*.[59]

C. *Judge Easterbrook v. The Ninth Circuit:* Britton v. Co-op Banking Group *and the Frivolity Loophole*

In *Britton*, the defendant in a securities fraud case asserted a position similar to that assumed by Judge Easterbrook in *Bradford-Scott*.[60] The defendant argued that because he had appealed the district court's denial of his motion to compel arbitration, the district court lacked jurisdiction to enter a default judgment against him for failure to comply with requests for discovery.[61] The Ninth Circuit panel handling the arbitrability appeal rejected this argument,[62] opining that the issue of arbitrability was

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[55] *Cf.* C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp., 716 F. Supp. 307, 310 (W.D. Tenn. 1989) (stating "this Court finds the time and expense of litigation to constitute irreparable harm in this instance").

[56] *See Bradford-Scott*, 128 F.3d at 506.

[57] *See supra* note 34.

[58] *Bradford-Scott*, 128 F.3d at 506.

[59] 916 F.2d 1405 (9th Cir. 1990).

[60] *See supra* note 51 and accompanying text.

[61] *See Britton*, 916 F.2d at 1411 ("[Defendant] relies upon the general rule that the filing of a notice of appeal divests the district court of jurisdiction and transfers jurisdiction to the appellate court.").

[62] *See id.*

completely severable from the merits of the underlying dispute.[63] Consequently, there was no reason that the district court could not proceed with the case while the issue of arbitrability was on appeal.[64] The Ninth Circuit panel also felt that to allow such a proposition to stand would permit "crafty litigants"[65] to frustrate the progress of cases in the district court through frivolous appeals of arbitrability determinations.[66]

Judge Easterbrook dealt with each of the Ninth Circuit's objections to the loss of jurisdiction argument in turn. As to the claim that arbitrability is an issue severable from the merits, Judge Easterbrook conceded the point as a valid premise but countered that the conclusion does not follow.[67] The severable nature of the arbitrability issue does not dictate that the ability of the district court to proceed on the merits is unaffected by the arbitrability appeal. Judge Easterbrook analogized the appeal of arbitrability to an appeal asserting a double jeopardy defense;[68] to an appeal asserting an Eleventh Amendment immunity defense;[69] and to an appeal asserting a qualified immunity defense.[70] In each case, the issue on appeal is dispositive of whether the case can be heard in the district court. Therefore, according to Judge Easterbrook, in each case it is inappropriate for the

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[63] *See id.* The Ninth Circuit's position turned on exactly the same phrase as Judge Easterbrook's—matters "involved in the appeal." *Id.*

[64] *See id.* at 1412.

[65] This is actually Judge Easterbrook's term. *See Bradford-Scott*, 128 F.3d at 506.

[66] *See Britton*, 916 F.2d at 1412. The *Britton* court also claimed that the FAA created a "system" for the district courts to "evaluate the merits of [a] movant's claim" and decide if a stay is appropriate. *Id.* This is unsupported by the statutory language and directly contradicted by one of the two cases cited by the *Britton* court as support for this assertion. *See supra* note 6; *see also* C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp., 716 F. Supp. 307, 309 (W.D. Tenn. 1989) (noting that § 16 does *not* address the issue of a stay pending appeal). The "system" used by those cited courts was, in fact, the four-prong test from *Hilton*. *See* Pearce v. E.F. Hutton Group, Inc., 828 F.2d 826, 829 (D.C. Cir. 1989) (implying the use of the *Hilton* test by the district court to grant stay of litigation pending an appeal of arbitrability); *C.B.S. Employees*, 716 F. Supp. at 309 (applying the *Hilton* test to arrive at a decision to grant stay of litigation pending appeal of arbitrability).

[67] *See Bradford-Scott*, 128 F.3d at 506.

[68] *See id.* (citing Abney v. United States, 431 U.S. 651 (1977)).

[69] *See id.* (citing Goshtasby v. University of Ill., 123 F.3d 427 (7th Cir. 1997)).

[70] *See id.* (citing Apostol v. Gallion, 870 F.2d 1335 (7th Cir. 1989)).

district court to soldier on while the dispositive issue is on appeal.[71]

In each case, however, the district court need not abstain if the appeal of the issue is frivolous.[72] This meets the second objection raised by the Ninth Circuit in *Britton* regarding crafty litigants filing frivolous appeals to impede the progress of litigation.[73] Judge Easterbrook noted that the plaintiffs in *Bradford-Scott* did not argue that the appeal of arbitrability was frivolous, nor did the plaintiffs assert that any of the individual claims against the defendants were "clearly non-arbitrable"[74] (and therefore, by implication, frivolous as the basis of an arbitrability appeal). Indeed, after *Bradford-Scott*, frivolity of the arbitrability appeal now arguably stands as the only reason a district court in the Seventh Circuit may refuse to issue a stay pending a § 16(a) appeal.

V. CONCLUSION

Judge Easterbrook's creation of an automatic stay pending appeal of an anti-arbitrability determination, combined with the Seventh Circuit's adoption of an almost irrebuttable presumption against a stay pending appeal of a pro-arbitrability determination, completes the Seventh Circuit framework for evaluation of stays pending appeal of arbitrability. This framework is ultimately consistent with the predominant federal policy favoring arbitration. Specifically, the stay framework accomplishes—without readily apparent loopholes—what § 16 of the FAA tried to accomplish with respect to the appealability of arbitration determinations. The framework clearly favors arbitration and the movement of cases into arbitration without unnecessary delay. This is exactly what Congress intended through its adoption of § 16 of the FAA.[75]

While the first half of the Seventh Circuit's framework remains at least arguably grounded in the pre-existing four-prong test, Judge Easterbrook's creation of the automatic stay stands without direct reference to statutory

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[71] *See id.*; *see also Apostol*, 870 F.2d at 1338 ("It makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one.").

[72] *See Bradford-Scott*, 128 F.3d at 506. If the appeal *is* frivolous, either the district court or the appellate court can so declare, and the district court can then move ahead with the case. *See id.* A finding of frivolity by the district court can be reviewed by the appellate court. *See Apostol*, 870 F.2d at 1339.

[73] *See Britton*, 916 F.2d at 1412.

[74] *See Bradford-Scott*, 128 F.3d at 506.

[75] *See* Siegel, *supra* note 5, at 376.

authority; indeed, it is largely the result of Judge Easterbrook's interpretation of the phrase "involved in the appeal." But this should be troubling to no one—in the course of Judge Easterbrook's discussion of the Ninth Circuit's holding in *Britton*, it becomes apparent that the position adopted by the Seventh Circuit in *Bradford-Scott* is the more logical position.

The assertion that, as a philosophical matter, the issue of arbitrability can be easily severed from the merits of a given dispute does not lead inexorably to the conclusion that a district court can continue to adjudicate the merits of a case while a court of appeals decides whether the district court is even the proper forum in which to proceed. On the contrary, when the question on appeal is arbitrability and a federal statute requires that arbitrable disputes be referred to arbitration upon proper demand, it cannot be said that the issue of the district court's power to proceed is *not* "involved in the appeal." The case for the automatic stay appears strong. The overall stay framework seems to be consistent with current federal policy in the areas of arbitration and appealability. It remains to be seen whether the Seventh Circuit's approach will prompt reexamination of the traditional four-prong test by the other circuits.

James R. Foley